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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY,
a non-profit corporation,

Petitioner,

v.

COUNTY OF SPOKANE,
a political subdivision of the State of Washington,

Respondent.

BRIEF OF PETITIONER

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I. INTRODUCTION

This appeal presents critical issues related to citizens' ability to prevent corruption of local government through the Public Records Act ("Act"), chapter 42.17 RCW.[1] In this case, Spokane County refused to provide public records which it feared might reveal illegal hiring practices and successfully resisted discovery for two years for the very same reason.

Plaintiff Neighborhood Alliance of Spokane County (NASC) is a community-based organization in Spokane that emphasizes government accountability, especially in land use and planning issues. In February 2005, NASC received a seating chart depicting office space for staff in Spokane County's Building and Planning Department. The chart included employees' first names, including two in one cubicle, "Ron and Steve," who were not current employees. (CP 278.)

Not long thereafter, the County hired Ron Hand and Steve Harris, the son of Commissioner Phil Harris, as Assistant Development Coordinators in the Building and Planning Department. Not only was Steve Harris the third son of Commissioner Phil Harris to be hired by the County, but it appeared from the seating chart that both men were hired *before* the County posted the positions much less hired them.

[1] Effective July 1, 2006, the Public Records Act was recodified at chapter 42.56 RCW. This case arose in May 2005, prior to recodification, and therefore citations will be to the code as it existed at that time.

This led NASC to believe the County may have engaged in illegal hiring practices. In order to confirm or dispel its concerns, Bonnie Mager, then Executive Director of NASC, filed public records requests for documents that would substantiate the date of the seating chart and the full names of the employees listed on the chart. The County's response was inadequate. It limited its search to locations where responsive records could not be found and utilized search terms that would ensure failure. Moreover, after NASC filed suit, the County engaged in a pattern of unjustified resistance to discovery, even that ordered by the trial court, which severely impeded NASC's prosecution of its case.

The Public Records Act mandates broad disclosure of public records.[2] "The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions."[3] The Act declares, "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."[4] It "is a strongly worded mandate for broad disclosure of public records" and is based upon the policy "that free and open

[2] *Limstrom v. Ladenburg,* 136 Wash. 2d 595, 603 (1998).
[3] *PAWS v. Univ. of Wash.,* 125 Wn. 2d 243, 251, 884 P.2d 592 (Wash. 1994).
[4] RCW 42.17.251.

examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."[5]

What happened in this case is that a citizen oversight group, having obtained information indicating that the County violated state hiring rules to hire the son of a County Commissioner, sought to use the public records act to obtain identifiable public records that would shed dispositive light on the question of whether Steve Harris was chosen for a position in the County Building and Planning Department before the selection process had even begun. Not only did the County refuse to produce the records requested, the evidence strongly suggests it may have actually destroyed them. By steadfastly refusing to provide public records that would corroborate the identity of the persons listed on the seating chart and resisting discovery, the County made a conscious decision to usurp the public's right to know whether its county government was violating the law.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Assignments of Error

1. The trial court erred by denying summary judgment to Plaintiff NASC and granting it instead to Defendant Spokane County.

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[5] RCW 42.17.340(3); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

2. The trial court erred by denying NASC's motion to compel discovery.

Issues Pertaining to Assignments of Error:

1. Whether the County violated the Act by failing to conduct reasonable searches for requested records where it searched only places where the records could not be found and utilized search terms unlikely to succeed.

2. Whether NASC requested identifiable public records where it asked for existing records with the full names of "Steve and Ron" and "Steve" at extension 7221 listed on the County's seating chart.

3. Whether the County violated the Act by not providing existing records with the full names of "Ron and Steve" as listed on the seating chart.

4. Whether the County violated the Act by destroying responsive records after these records were requested.

5. Whether a public records plaintiff is entitled to the same scope of discovery allowed to other plaintiffs under Washington's discovery rules.

III. STATEMENT OF THE CASE

a. Statement of Undisputed Fact[6]

On February 16, 2005, a copy machine in the Spokane County Building and Planning Department began printing numerous copies of an undated seating chart showing the cubicles where department employees sit. (CP 60, 283-284.) The chart came from Pam Knutsen's computer. (CP 60-61; 284) The chart depicted seating arrangements in cubicles of current employees on the first floor of the Building and Planning Department as well as two new employees who had not yet been hired, "Ron and Steve." (CP 283-284.)

On or about February 18, 2008, Building and Planning Department planner Theresa (Terry) Liberty sent a copy of the undated seating chart and an unsigned letter to Marilyn Moos, at that time a member of the local Human Rights Commission. (CP 342-343.) Ms. Moos received the letter with the copy of the undated Spokane County planning seating chart by U.S. Mail on or about February 19, 2005. (CP 84-89.) Ms. Moos provided true and correct copies of the letter, undated seating chart, and envelope in which she received these items to Bonnie Mager on or about early March 2005. (CP 90-93; 100-103.) On February 22, 2005, a second iteration of

[6] The County neither disputed nor provided contraverting evidence to the above "Statement of Undisputed Fact" which was included in NASC's Motion for Summary Judgment and Memorandum in Response to the County's Motion for Summary Judgment. (CP 223-228; 631-637.)

the seating chart was printed and handed out to staff. The chart no longer had the names "Ron and Steve" in a cubicle but instead simply had the words "New" in two other cubicles. (CP 285, 291-294, 276-280.)

On or about the first two weeks of March 2005, Spokane County posted notice of two openings for the position of Development Assistant Coordinator. (CP 257-275.) After interviews conducted by Building and Planning Administrative Director James Manson, and Assistant Directors Pam Knutsen, Mark Holman, and John Pederson, on March 18, 2005 Spokane County hired Steve Harris, the son of then Commissioner Phil Harris, as Development Assistance Coordinator 1 to work with Ron Hand, who had also been recently hired as Development Assistance Coordinator 2. (*Id.*)

On May 3, 2005, Bonnie Mager, on behalf of the Neighborhood Alliance, sent a public records request to Spokane County asking for all records created in January 2005, February 2005, and March 2005 "that display either current or proposed office space assignments for County Building and Planning Department officials. (CP 276-280.) On May 13, 2005, the County provided Ms. Mager with three copies of the "county planning seating chart," one of which was undated. (*Id.*; CP 153; 276-280.) The other two iterations of the chart were dated February 22, 2005 and April 18, 2005. (CP 276-280.)

By letter dated May 16, 2005, Bonnie Mager, on behalf of the Neighborhood Alliance, sent a letter to Spokane County requesting that the county provide it the opportunity to review public records that recorded the identities of three individuals. The request stated:

> Pursuant to the state public records act (RCW 42.17), I am writing to request the opportunity to review public records created, received and/or retained by Pam Knutsen, or any other county official or employee, that record the following information.
>
> 1. The complete electronic file information logs for the undated county planning division seating chart provided by Ms. Knutsen to the Neighborhood Alliance on May 13th. This information should include, but not necessarily be limited to, the information in the "date created" data field for the document as it exists on the specific Microsoft Publisher electronic document file created for the referenced seating chart. The requested information should also include, but not be limited to, the computer operating system(s) data record indicating the date of creation and dates of modification for the referenced seating chart document.
>
> 2. The identities of "Ron & Steve" individuals who are situated near the center of the seating chart referenced in item # 1. Also, the identity of the individual listed as "Steve" in the cubicle with the number 7221 at the top of the chart.
>
> By the term public records, I am invoking a broad definition, consistent with RCW 42.17.020(36) and specifically mean to include records that exist in any electronic form as well as those that exist on paper. This

> should be read to include, but not be limited to, records preserved in paper correspondence, electronic mail, facsimiles, videotape, and computer files. Pursuant to RCW 42.17.310, please identify any record covered by the above requests that is being withheld as exempt, and provide a summary of the record's content and the specific reason for the exemption.

(CP 48-49; 51-52.)

Spokane County responded to the May 16, 2005 request by letter dated June 6, 2005. (CP 49; 54-56.) In response to Item # 1 of Ms. Mager's May 16, 2005 public records request, Spokane County tendered one document – an electronic information log created for the undated county planning division seating chart located by Pam Knutsen, Assistant Director of Building and Planning for Spokane County, in her new computer. (CP 61; 65.) The electronic information log for the undated county seating chart included "date created," "date modified," and "date accessed" data fields. (CP 65.) The "date created" data field listed on the information log showed that the seating charts were "created" at a later date than the "date modified" data fields. (*Id.*) The County later explained this discrepancy by stating that Ms. Knutsen's personal computer (PC) was replaced in April 2005 at which time the data on her old personal computer was transferred to her new computer. "When that copying takes place, all documents are given a new 'Date Created.' Once all documents are copied, the new PC is delivered to the County

employee." (CP 58.) The County further explained that its Information Systems Department (ISD) then takes the old computer and hard drive back to its office where it eventually wipes all data off the old hard drive. (CP 58.)

Although data stored on local PC's is not backed up, the County requires its employees to copy and paste documents created on behalf of the agency on the appropriate directory or network for storage and backup by Information Services Department (ISD). (CP 287-288; 332.) Ms. Knutsen's old computer eventually had its hard drive wiped when it was given to Spokane County employee Gloria Wendel in August of 2005, three months after Bonnie Mager's request for records contained in that computer. (CP 494, 602-607.)

By letter dated November 28, 2005, Plaintiff's counsel made a public records request for the "email or memo requesting that Ms. Wendel receive Ms. Knutsen's computer and the documentation showing when Ms. Knutsen's computer was wiped of data." (CP 600-607.) The County responded on December 5, 2005 by providing records regarding computer work done for Ms. Wendel in August 2005. (CP 596-599; CP 600-607.) In its answers to a written deposition, the County admitted that it did not know the date Ms. Knutsen's hard drive on her old "PC" was wiped and that there was no record that it was wiped prior to Bonnie Mager's May

16th request for records from that computer hard drive. (CP 608-612.) Further, the County admitted in deposition that it made no efforts to confirm whether or not Pam Knutsen's old "PC" retained any record of the seating chart in response to Bonnie Mager's request for records from that hard drive. (*Id.*) Nor did the County state whether or not Ms. Knutsen had copied the county planning seating chart into another directory for storage and backup.

The County did not provide any records in response to Item # 2 in Plaintiff's May 16, 2005 public records request or state specific exemptions authorizing the withholding of such records on the grounds that the Public Records Act (PRA) "does not require agencies to explain public records. As such, no response is required with respect to item number 2 referenced above." (CP 54.) Nevertheless, with regard to Item # 2, Ms. Knutsen stated her "search for documents which might reference the identities of 'Ron and Steve' and 'Steve' turned up nothing. Stated another way, there are no documents which reference the seating chart and identify the full names of 'Ron and Steve' therein." (CP 62.)

On May 16th, records existed that identified Steve Davenport as being at extension 7221 and the full names of Ron Hand and Steve Harris. (CP 111; CP 529-530.)

b. Procedural History

NASC filed suit on May 6, 2006 and served written discovery to Spokane County a month later. (CP 149-188.) The discovery covered issues of liability, including questions regarding the County's search procedures, as well as penalties, including questions regarding motivation and potential destruction of records. The County answered only seven of twenty-six requests. (CP 149-173.)

From August through November, 2006, NASC attempted to arrange depositions of county employees, particularly Pam Knutsen, the creator and custodian of the seating chart, and to receive answers to its written discovery. (CP 104-105.) The County agreed to submit answers to written discovery by September and schedule a deposition of Ms. Knutsen by mid-October. (CP 105.) No answers were forthcoming nor was the deposition scheduled. On October 30, 2006, the County agreed once more to a deposition of Ms. Knutsen, this time in December. Instead, the County filed for summary judgment on November 16, 2006. (CP 105.)

In support of summary judgment, the County filed affidavits by Pam Knutsen, Assistant Director of Building and Planning, and Bill Fiedler, the County's Director of Information Systems Department (ISD). The affidavits raised even more questions about the County's search efforts and the potential destruction of responsive records, questions that

discovery could have addressed. In order to avoid defending against summary judgment without discovery, NASC asked the County for a brief continuance to allow the trial court to rule on discovery. (CP 193.) The County refused. (*Id.*)

On December 5, 2006, the trial court heard Plaintiff's motions to compel discovery and continue summary judgment. Prior to and during hearing, NASC offered to narrow its discovery to the core issues of liability – whether documents existed at the time the request was made and the search processes – and to delay discovery on issues related to penalties until after summary judgment on liability. (RP 6,7, Dec. 5, 2006.) In order to "retain" control of the discovery process, the County would only agree to a CR 31 deposition of Ms. Knutsen by written questions. (RP 20, Dec. 5, 2006.) NASC, worried the county would continue its pattern of resistance, agreed so long as it retained the right to return to court should the County fail to respond in good faith. (*Id.* at 24.) The trial court agreed, continued the summary judgment and motion to compel and ordered the written deposition on two issues only - whether documents existed and the process used to find them. (CP 356-381, RP 24, Dec. 5, 2006.)

Even with a court order, gaining access to Ms. Knutsen was not easy. It took several months and involved more wrangling with the County over the scope of the questions. (CP 384, 385-386, 421-423.)

The written deposition was finally taken on October 12, 2007 and Ms. Knutsen answered only 18 of 53 questions. (CP 424-485) Four months later, the County tendered answers to five more written questions. (CP 608-612.)

On April 4 and May 6, 2008, NASC filed a cross motion and opposition brief for summary judgment, each supported by affidavits from Building and Department staff with personal knowledge of the issues herein. (CP 282-328; CP 329-335; CP 336-240; CP 341-349.) The County asked the trial court to strike these declarations as irrelevant and speculative, but tendered no contraverting evidence. (CP 620, 622.)

At hearing on May 13, 2008, the parties agreed to argue their respective summary judgment motions first and reach discovery issues as necessary. Finding there had been ample time for discovery, the trial court granted summary judgment to the County and denied NASC's motion to compel. (RP 33, May 13, 2008.)

NASC asks this Court to reverse for two reasons. First, there are no genuine issues of material fact as to whether Spokane County violated the Public Records Act by failing to conduct reasonable searches for records responsive to NASC's request. And second, there are no genuine issues of material fact as to whether the County violated the Act by failing to disclose existing responsive records. Thus NASC is entitled to

summary judgment as a matter of law.

Standard of Review

The standard of review on appeal from summary judgment is de novo and the appellate court engages in the same inquiry as the trial court.[7] Summary judgment is properly granted if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[8] A fact is material when the outcome of litigation is entirely or partially dependant on the fact.[9] The moving party has the burden to show that, in the light most favorable to the non-moving party, there exist no genuine issues of material fact and that summary judgment is appropriate as a matter of law.[10] When the moving party establishes that "reasonable persons could reach but one conclusion or could not differ about the alleged fact" the burden is met.[11] The non-moving party then has the opportunity to argue that a genuine issue of material fact exists. In doing so, the non-moving party may not rely on the pleadings to defeat the motion, but rather must establish sufficient evidence that genuine issues of

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[7] *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (*citing Kruse v. Hemp,* 121 Wn .2d 715, 722, 853 P.2d 1373 (1993)).
[8] *Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.,* 115 Wn. 2d 506, 516, 799 P.2d 250 (1990).
[9] *Id.*
[10] *Id.* at 516, 799 P.2d at 257.
[11] *Hill v. Cox,* 110 Wn. App. 394, 403, 41 P.3d 495 (2002).

material fact exist.[12]

An appellate court reviews a trial court's discovery order for an abuse of discretion.[13] An appellate court will find an abuse of discretion only "on a clear showing" that the court's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."[14] A trial court's discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard."[15]

IV. ARGUMENT

1. Spokane County violated the Act by failing to conduct reasonable searches for the documents requested.

a. A failure to conduct a search reasonably calculated to find requested records is a violation of the Public Records Act.

The purpose of the Public Records Act is to require state agencies to make available for public inspection and copying all public records not falling within enumerated exceptions.[16] It is a strongly worded mandate, interpreted broadly and requires agencies to give "the fullest assistance to

[12] *Seybold v. Neu,* 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).
[13] *John Doe v. Puget Sound Blood Ctr.,* 117 Wn. 2d 772, 778, 819 P.2d 370 (1991).
[14] *State ex rel. Carroll v. Junker,* 79 Wn. 2d 12, 26, 482 P.2d 775 (1971).
[15] *State v. Rohrich,* 149 Wn. 2d 647, 654, 71 P.3d 638 (2003).
[16] RCW 42.17.260(1).

inquirers and the most timely possible action on requests for information."[17]

According to the Ninth Circuit, giving full assistance to a requestor requires a demonstration that the agency "has conducted a search reasonably calculated to uncover all relevant documents."[18] The adequacy of a search "is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case. In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.[19] The agency must also demonstrate that it has used "methods that can be reasonably expected to produce the requested information" and "reasonably calculated to uncover all relevant documents."[20]

Agency affidavits are sufficient for summary judgment purposes "only if they are relatively detailed in their description of the files

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[17] RCW 42.17.290; *Spokane Research & Defense Fund v. West Cent. Community Development Ass'n* 133 Wn. App. 602, 606, 137 P.3d 120, 122 (2006).

[18] *Citizens Com'n on Human Rights v. Food and Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995) quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985). *See also Lane v. Dept. of Interior*, 523 F.3d 1128 (9th Cir. 2008). (government need not show it produced every responsive document, but only that search was adequate.)

[19] *Zemansky,* 767 F.2d at 571. *See also Hearst Corp. v. Hoppe*, 90 Wn. 2d 123, 128, 580 P.2d 246 (1978) (Washington's Public Records Act closely parallels the federal Freedom of Information Act (FOIA) and thus, where appropriate, Washington courts look to judicial interpretations of FOIA in construing the PRA.)

[20] *Zemansky,*767 F.2d at 571 *citing Campbell v. Dep't Justice, 164 F.3d 20, 27 (D.C. Cir. 1991); Weisberg v. United States Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith."[21] However, "where the requests are 'well-defined' and the complainant submits positive indications of overlooked materials," summary judgment is inappropriate on behalf of an agency.[22]

b. The County failed to conduct a reasonable search for the electronic log.

The County admits it did not provide the record requested – a complete information log showing the date of creation of the county's seating chart – because it could not be located in Ms. Knutsen's new computer, the only place searched. (CP 60-65 and CP 57-59.) Mr. Fiedler explained the original log couldn't be found on Ms. Knutsen's new computer because documents on employees' personal or "C" drives are not backed up and that it couldn't be found on her old one because "standard practice of the County of Spokane ISD" is to wipe hard drives before they are sold or rebuilt and that "this process was followed with regard to Ms. Knutsen's PC in April 2005." (CP 58.)

However, the evidence shows that Ms. Knutsen's computer was rebuilt and given to another County employee on or about August 8, 2005,

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[21] *Zemansky*, 767 F.2d at 573.
[22] *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 326 (citations omitted) (D.C. Cir. 1999).

almost three months after the records request. (CP 494, 600-607.) And, contrary to Mr. Fiedler's affidavit, the County admitted it does not know whether the wipe occurred in April 2005. (CP 608-612.) Not only does the County admit it does not know and has no records showing when the hard drive in Ms. Knutsen's old PC was wiped, where it was wiped, or who did it, it admits it made *no effort* to find out in response to the May 16, 2005 request. (*Id.*)

The County is under a duty to preserve its records in compliance with the Records Retention Act, chapter 40.14 RCW. Additionally, under the Public Records Act, an agency must retain possession of a requested record and may not destroy or erase it while a pending public records request is resolved.[23] Given these duties, as well as the obvious need to preserve employee work product, it is hardly plausible that the County has no policies or procedures for saving staff work product other than on personal computers that are not backed up.

And, as it turns out, it does. NASC filed declarations by experienced Building and Planning staff with personal knowledge of the seating chart and the issues herein. (CP 282-328, 329-335, 336-340, and 341-349.) Senior Planners Bruce Hunt and Steve Davenport were both present on February 16, 2005 when the seating chart was printed and

[23] RCW 41.17.290.

discussed the staff changes noted on the chart with Ms. Knutsen. (CP 283-285, 330.) In fact, Mr. Davenport remembers seeing a substantially similar electronically produced floor plan in 2003 utilized by Ms. Knutsen for reorganizations at that time. (CP 330.)

Mr. Hunt confirms that it is routine policy for staff to copy and paste all county work from staff "C" drives on their personal computers to network drives for backup and storage. (CP 287-288, 332, 283-284.)

> "Having worked for Spokane County for almost seventeen years, I am familiar with document retention requirements. The County offers computer training to its employees which includes training on this issue. As a county agency, we are required to keep records of our work. To that end, there are directories on the department's network which serve to store and backup our work. It is well understood that anything on one's "C" drive or local drive that is not copied to a network directory should be non-essential or personal or temporary documents. When we work on our "C" drive, we are taught to copy and paste that work onto the appropriate network drive or directory to be backed up by ISD. This is common practice within our department.
>
> Based on my experience working for the County, a reorganization chart would be the type of document that is saved in a directory – in this case an administrative directory, for example – as a routine matter. A reorganization seating chart clearly involves agency rather than personal matters and was used by the administration in making decisions regarding personnel.... Here the chart was used by staff and administration as a reorganization tool in determining who would be in what cubicles and what phone/data lines, etc., were needed in those cubicles.

(CP 288.) [24]

[24] *See also* Declaration of Steve Davenport (CP 332).

Mr. Hunt's and Mr. Davenport's declarations contain admissible, relevant evidence made on personal knowledge and not speculation regarding where such documents as a reorganization chart would be stored. At no time did the County deny its record retention policies as described by these employees nor did it deny that such charts were used by Ms. Knutsen as a reorganization tool over several years. Yet neither Ms. Knutsen's nor Mr. Fiedler's affidavit mentions network directories or discusses why a search of these would have been futile. Instead, the affidavits confirm that Ms. Knutsen searched the only place the document could **not** be found. Without checking her old computer or looking in an appropriate network directory, Ms. Knutsen concluded "there were no other computer documents or any other documents which responded to Item # 1...." (CP 62.)

The County's affidavits on this issue are conclusory, fail to provide sufficient detail to evidence an adequate search, and are controverted by other evidence in the record. The County had ample opportunity to supplement its affidavits to address these issues, but did not. Consequently there are no issues of material fact regarding the County's failure to conduct an adequate search for the complete electronic information log showing the date the document was created.

c. The County failed to conduct an adequate search for the records responsive to Item # 2 of the request.

i. Item # 2 requested identifiable public records.

Although the County indeed conducted a search for Item # 2, it argues it was not required to do so because the request was for "an explanation of the meaning of the two names on the seating chart" and not records. (CP4 42.) NASC argues the request falls squarely within the Act's definition.

A "public record is broadly defined to provide access to as much governmental information as possible."[25] A public record subject to disclosure under the Act is: 1) any writing, 2) containing information relating to the conduct or the performance of any governmental or proprietary function, 3) prepared, owned, used or retained by a state or local agency regardless of physical form or characteristics.[26] The Act does not require an agency to explain a public record or to create records that do not otherwise exist; however, it does require an agency to provide any nonexempt existing records after receiving a request for an "identifiable public record."[27]

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[25] *See Yakima Newspapers, Inc., v. City of Yakima*, 77 Wn. App. 319, 323, 890 P.2d 544 (1995) ("public record" defined "broadly").
[26] *Confederated Tribes of Chehalis Reservation v. Johnson,* 135 Wn. 2d 734, 746, 958 P.2d 260 (1998). *See also Daines v. Spokane County,* 111 Wn. App. 342, 347, 44 P.3d 909 (2002).
[27] *Smith v. Okanogan County*, 100 Wn. App. 7, 12-14, 994 P.2d 857 (Div. III 2000); RCW 41.17.270.

An identifiable public record is one in which the requester has given a " 'reasonable description enabling the government employee to locate the requested record.'"[28] This requirement calls merely for a "reasonable description," " but it is 'not to be used as a method of withholding records.'" [29] Applying these requirements to the May 16, 2005 request shows that the request in Item # 2 was for an identifiable public record.

A writing - Here, the request facially requests existing writings – "I am writing to request the opportunity to review public records created, received and/or retained by Pam Knutsen, or any other county official or employee, that record the following information…." By using the word "records" and the past tense – created, received, retained – the letter expressly requests writings already in existence as of the date of the request.

Reasonably identifiable request- The request was for records showing the full names of three county employees, current or proposed, whose first names only were listed on a county seating chart for the Building and Planning Department. Ms. Knutsen admitted that the seating chart came from her computer. (CP 61.) She is an Assistant Director of the

[28] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998).
[29] *Bristol-Meyers Co., v. F.T.C.*, 424 F.2d 935, 938 (D.C. Cir. 1970).

Building and Planning Department and cannot plausibly deny that she did not know the names of the employees on the chart she created and with whom she worked. Moreover, after Ron Hand and Steve Harris were hired, they shared a cubicle. (CP 286.) And it is undisputed that Steve Davenport's phone extension in his cubicle was and is "7221." (CP 330.) From these facts, it is simply not believable that the County could not identify records responsive to the request, i.e. records with the full names of the employees on the chart it created.

Containing information pertaining to the conduct or the performance of any governmental or proprietary function – A government acts in a proprietary capacity when it engages in a business-like venture as opposed to acting in a governmental capacity.[30] Hiring and firing employees are normal business activities and hence would fall within this definition.[31] Allocating work space and providing administrative support to employees are similarly activities normally performed by businesses. The records requested here pertain to both these issues - the conduct of the County in making hiring decisions and allocating work space to current and prospective employees.

Prepared, owned, used or retained - Documents are used by a

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[30] *Hoffer v. State*, 110 Wn. 2d 415, 422, 755 P.2d 781 (1988).
[31] *See Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995) (Terminating an employee is a proprietary function of government).

government when there is a nexus between the information and the agency's decision making process.[32] The seating chart was used by staff and administration as a reorganization tool in determining in which cubicles it would place new hires and current staff and what phone/data lines, and other logistical support or supplies would be needed by these staff, among other things. (CP 287-288, CP 330, CP 517) (email from administrative staff providing notice of design changes to cubicles to accommodate new staff and requesting phone and data lines for new hires in cubicles). It is plausible to assume, then, that the County would have records recording the allocation of space, provision of supplies and support, and other administrative or personnel matters regarding the existing employee Steve at ext. 7221 and new hires, Steve and Ron, with their full names and which were used by the administrator. Thus, the request was for records prepared, owned, created and used by the County.

Nevertheless, citing to *Smith v. Okanogan*, the County maintains the request was for information and not records.[33] In *Smith v. Okanogan*, the court examined a number of different requests filed by a citizen with Okanogan County and determined that some of these constituted requests

[32] *Concerned Ratepayers Ass'n v. Washington State Gambling Com'n,* 139 Wn. App. 433, 445, 161 P.3d 428 (2007).
[33] *Smith v. Okanogan*, 100 Wn. App. 7, 994 P.2d 857 (2000.)

for information rather than public records.[34] The court explained that the Act requires disclosure only if there is a "specific request for records."[35] "An important distinction must be drawn between a request for information and a request for the records themselves. The Act does not require agencies to research or explain public records, but only to make records accessible to the public."[36]

In *Okanogan*, the agency denied several requests on the grounds they were for records that did not exist. For example, the plaintiff asked for "a list of ALL persons including yourself, whether appointed, elected, hired, or under contract, that are employed by the Office of the Prosecuting Attorney, including their titles, descriptions of duties, [and] rate of compensation." Holding that there is no duty under the State Act to create a record that does not exist, the court found this was not a valid request.[37]

Relying on *Dawson v. Daly*, the court also found the county properly denied requests which it deemed "verification requests."[38] In *Dawson*, a requester had asked for documents from the personnel file of a deputy prosecutor. The prosecutor disclosed the contents of the file except

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[34] *Id.* at 14-23 *Id.* at 15.
[35] *Id.* at 12.
[36] *Id.* citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), review denied, 137 Wn. 2d 1012, 978 P.2d 1099 (1999).
[37] *Okanogan,* 100 Wn. App. at 14.
[38] *Id.* citing *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993).

for some letters and notes, a performance evaluation and "requests for verification of employment." *Id.* at 787. The Court found in pertinent part:

> "that the documents in the files compiled on Daly are public records because they are writings relating to the performance of prosecutorial functions, and they are used by the prosecutor's office in carrying out those functions. The evaluations of Stern's performance are also public records because they are prepared by the prosecutor's office, and they contain information relating both to the conduct of government and to the performance of governmental, prosecutorial functions. The requests for verification of Stern's employment, however, are not public records. Verification requests seeking information about an employee's position, salary, and length of service relate neither to the conduct of government, nor to the performance of any governmental function. Verification requests are not within the scope of the act and are not subject to disclosure."

Dawson v. Daly, 120 Wash.2d 782, 789, 845 P.2d 995 (1993).[39]

Unlike some of the records in *Okanogan*, NASC's request was solely for existing public records. Further, it was not a request for information or for an explanation. Rather, the request was for reasonably

[39] In a recent California Supreme Court case, the Court of Appeals in that case undertook a law review of case law from numerous jurisdictions and found that the disclosure of public employee names and salaries as public records was overwhelmingly the norm in state and federal courts. *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319, 332 (Cal. 2007). This seems sensible as the salaries of government employees are paid by the taxpayers who have a right to know who the government has hired to conduct its business and how much it's paying them. It is hard to understand how such hiring decisions do not relate to government conduct. As such information is of legitimate interest to the public, should this court find that the records requested in Item # 2 are verification requests, we would suggest that the time may have come for the courts of this state to revisit this issue. A list of cases cited to in *Local 21, supra*, is attached hereto as Appendix A.

identifiable records that already existed, related to the conduct of the county in personnel matters and used by the county in making decisions concerning current and prospective employees. Thus, if such records existed that contained information identifying the named individuals on the chart, then those public records would have been responsive to this request and should have been provided.

Because the County exercises custody and control over its documents and employees and actively resisted discovery, it is hard to know exactly what documents the County might have had that would have been responsive to this request. The seating chart did not exist in a vacuum, however. It existed to help Ms. Knutsen allocate and organize work space for department personnel. Thus, it is reasonable to believe there must be records with the names of employees who work in the cubicles on the chart and which were used by the County to either allocate space, provide logistical support and/or supplies or which concerned other administrative and personnel decisions.

In fact, the following records appear to be such records[40]:

- February 22, 2005 notification of "office reorganization," from Laurie Carver, Building and Planning Staff Assistant. "Tomorrow morning beginning at 7:30 we have moving professionals coming in to make design changes to our current

[40] These were provided to NASC's counsel on November 7, 2005 in response to his request for computer records showing why Ms. Knutsen's computer was replaced and what happened to her old computer. (See CP 350-52.)

> cubicle layout in order to accommodate new staff positions in the office. We will need the following: Phone changes – I can provide a list to Dan or Gregg if they will contact me.... Datapath – we will need drop lines put in place for several new cubicles." (CP 517.)

It is reasonable to infer the "list" referred to herein may have been responsive to the request.

- March 16, 2005 email, Laurie Carver, re: PC/Phone Setup for new employee. "I need a PC and email account setup for Ron Hand. His start date will be Monday, March 21, 2005. I will also need a phone set up for Ron and a long distance ID number." (CP 529.)

It is reasonable to infer the phone line would have been for Mr. Hand's cubicle.

- March 22, 2005 email, Laurie Carver, re: " Need a PC and email setup for Phillip 'Stephen' Harris. His start date will be April 1, 2005. Stephen will be our new Development Assistance Coordinator 1." (CP 530.)

It is reasonable to infer Mr. Harris' phone and PC would have been used in his cubicle.

Arguably, these three records and the employee list referred to in the February 22 email above would have been responsive to the May 16, 2005 request as they are identifiable public records that provide a nexus between Ron Hand and Steve Harris and the cubicles on the seating chart. Moreover, they pertain to the conduct of the County in its proprietary function and were used by the County in providing logistical support to its

new employees.

As such, the Neighborhood Alliance requested identifiable public records that the County was required to provide.

ii. The County's search for records responsive to Item # 2 was inadequate.

Despite its argument that it need not respond to Item # 2, the County did indeed attempt to locate these records and in doing so, had a duty to conduct a reasonable search. In her affidavit, Ms. Knutsen stated that "her search for documents that might reference the identities of 'Ron and Steve' and 'Steve' turned up nothing. Stated another way, there are no documents which reference the seating chart and identify the full names of 'Ron and Steve' or 'Steve' therein." (CP 62.) She does not say which directories or drives she searched or whether she asked other staff to search as well.

Not only does Ms. Knutsen fail to provide a reasonably detailed description of her search, her affidavit shows she restricted her search to documents with the terms "seating chart." There is no evidence the County referred to the seating chart as a "seating chart." Indeed the electronic log provided shows it as either a "reconfiguration" or "floor plan." (CP 54-56.) And in their declarations, county staff Bruce Hunt, Steve Davenport and Chuck Dellinger refer to it as "an electronically produced floor plan,"

"reconfiguration chart," "cubicle layout," or "floor plan." (CP 330-331, 283- 284, 288, 336-337.)

There is no rationale for restricting the search to terms unlikely to succeed. In *Yousoufian*, the Washington State Court of Appeals found the agency's refusal to use search terms adequate to address Mr. Yousoufian's request raised a strong inference that the County knew the search was inadequate.[41] Similarly, in a1996 case, the District of Columbia Court of Appeals found the F.B.I conducted an inadequate search where the requestor asked for the director's "commitment calendars," but the agency searched only for records containing the term "commitment" and not more common terms such as "diary" or "appointment."[42] As the D.C. court stated two years later, an agency "must be careful not to read the request so strictly that the requestor is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requestor."[43]

As in those cases, the County here unreasonably limited its search to words used by the requestor. Rather, the County had a duty to interpret the request broadly and to search in a manner reasonably calculated to find

[41] *See Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 852-53, 60 P.3d 667 (2003), overturned on other grounds, 152 Wn.2d 241, 98 P.3d 463 (2004). (Using inadequate search terms "raises a strong inference that the department conducted a search that it knew was inadequate to address Yousoufian's request.")
[42] *Summers v U.S. Dept. of Justice,* 934 F. Supp. 458, 461 (D.D.C. 1996).
[43] *Horsehead Indus, Inc., v. U.S. Envtl. Prot. Agency*, 999 F. Supp. 59, 66 (D.D.C. 1998)(citation omitted).

responsive records, "not as a method to withhold" them.[44] In failing to do so, it violated the Act.

iii. The County violated the Act by failing to produce existing documents within its custody responsive to Item # 2.

At the time of the request, the County had at least three documents responsive to Item # 2 – the emails of March 2005 from Laurie Carver regarding logistical support for Ron Hand and Steve Harris's cubicles and the work list referred to in one of these emails. (See infra at 27-28). The County did not provide these to NASC in response to its May 16, 2005 request and in doing so, violated the Act.

iv. The trial court erred by failing to require the County to engage in good faith discovery.

a. Public records plaintiffs have the same right to discovery as other plaintiffs under state discovery rules.

The procedural history in this case shows a pattern of unjustified resistance to discovery by the County, even that ordered by this Court. (CP 104-123.) Rather than comply with court rules and orders, the County sought court protection from what it described as an invasive, harassing "fishing expedition." (CP 136.) According to the County, NASC's suit was an illegitimate attempt to use the Act to uncover internal government

[44] *Bristol Meyers Co. v. F.T.C.,* 424 F.2d 935, 938 (D.C. Cir. 1970) (requirement to reasonably identify records sought is not to be used as a method of withholding records.)

dealings (CP 137) and its discovery so "far-reaching" and "irrelevant" that the County needed court protection, not only from further written discovery, but from depositions of "any Spokane County personnel." (CP 136-137.)

It is well settled in this state that the civil rules, including discovery, apply to public records cases.[45] Thus, not only is a requestor's intent irrelevant to an agency's duty to respond under the Act, an agency subject to the Act cannot evade discovery that otherwise comports with the rules.[46]

b. **Plaintiff's discovery requests were in accord with state rules.**

As stated by the Washington State Supreme Court, "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[47] Here, NASC's discovery sought just that - relevant information that would lead to admissible information regarding the

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[45] *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn. 2d 89, 105 (2005).
[46] RCW 42.17.270. *See also Concerned Ratepayers v. PUD No. 1 of Clark County, Washington*, 138 Wn. 950, 956 (1999) (trial court's findings in public records case relied on depositions of witnesses); PAWS v. Univ. of Wash., 125 Wn. 2d 243, 268 (1994) (referring to "pretrial discovery" in public records case); *Coalition v. Dept. of Public Safety*, 59 Wn. App. 856, 859 (1990) (plaintiff "conducted further discovery" after filing of action and preliminary proceedings).
[47] *Bushman v. New Holland Division of Sperry Rand Corp.*, 83 Wn.2d 429, 435, 518 P.2d 1078 (1974).

existence of documents responsive to its request and the County's search for those records.[48]

It is well settled that the governing pre-trial deposition-discovery rules are to be given a "broad and liberal construction."[49] These rules "were designed to eliminate the 'hide and seek' trial practices encouraged by earlier procedures. They serve to narrow the issues and provide access by all parties to the facts pertinent to these issues." *Id.*

Yet the County argued below that these broad rules are somehow restricted in public records cases. (CP 135-145.) That is simply not the law in Washington. There is no evidence that Washington courts place more limits on discovery in a public records case than any other. Instead discovery is bounded only by the civil rules.[50] Under these, discovery is limited primarily by relevance to the subject matter of the case.

The subject matter of a public records action is not simply the existence or nonexistence of relevant documents, or whether a document

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[48] NASC's requests for admission, interrogatories and requests for production are attached to CP 149-188. The CR 31 deposition questions are at CP 424-485 and CP 608-612.

[49] *McGugart v. Brumback,* 77 Wn.2d 441, 444, 463 P.2d 140 (1969) *citing Moore v. Keesey*, 26 Wash.2d 31, 173 P.2d 130 (1946); *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

[50] *See Spokane Research and Defense Fund v. City of Spokane*, 155 Wn. 2d 89, 105 (2005) (normal civil procedures are an appropriate method to prosecute a claim under the liberally construed PDA); *Concerned Ratepayers v. PUD No. 1*, 138 Wn. 2d 950, 956 (1999) (trial court's findings relied on depositions of witnesses); *PAWS v. Univ. of Wash.*, 125 Wn. 2d 243, 268 (1994) (referring to "pretrial discovery"); *Coalition v. Department of Public Safety*, 59 Wn. App. 856, 859 (1990) (Plaintiff "conducted further discovery" after filing of action and preliminary proceedings).

was provided timely or cited exemptions appropriate (CP 138), but also "the agency's decision not to disclose records, and the grounds for that decision."[51] In fact, the "reasons behind agency decisions to withhold records" are so critical in public records litigation as to need no discussion. *Id.*

Civil Rules 26-37 govern pretrial discovery. CR 26(b) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

These rules allow broad discovery into the subject matter of the claim with no express limit but relevancy, subject to narrowing court orders. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

[51] *PAWS*, 125 Wash. 2d at 270 n. 17.

evidence.[52] In other words, evidence is relevant if it "has a tendency to prove or disprove a fact, and 2) that fact is of some consequence in the context of other facts and the applicable substantive law." This means that the requesting party may seek facts offering not only direct evidence but circumstantial evidence and facts bearing on the credibility of witnesses.[53] Evidence may also be relevant even though it did not play a part in the incidents in question.[54] And asking for disclosure of persons with relevant information is hardly "fishing." It is proper.[55]

"The only limitation is relevancy to the subject matter involved in the action, not to the precise issues framed by the pleadings...."[56] Thus, inquiry should be allowed as to any matter which is or may become relevant to the subject matter of the action, subject only to objections of privilege. *Id.* In reality, this is a very low bar and all that is required is minimal logical relevance.

Through correspondence with the County and documents tendered in response thereto, NASC had reason to believe the County may have been in possession of the original electronic information log requested on May 16, 2005 and which may have been thereafter destroyed. This is not

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[52] ER 401.
[53] *State v. Rice*, 48 Wn. App. 7, 737 P.2d 726 (1987).
[54] *See State v. Quigg*, 72 Wn. App. 828, 866 P.2d 655 (1994)(defendant's fictional story relevant).
[55] *See Agranoff v. Jay*, 9 Wn. App. 429, 512 P.2d 1132 (1973) (Requesting disclosure of persons with relevant information is proper under CR 26(b)).
[56] *Bushman*, 83 Wn. 2d at 435.

mere speculation. Rather, it is based on public records tendered to NASC's counsel and the affidavits of County employees. (CP 486-615; CP 48-65.) Because erroneous destruction of public records that are not otherwise exempt constitutes an erroneous denial of access under the Act, discovery on this issue is germane to the subject matter of this case.[57]

The request also asked for records showing the last names of current or proposed employees "Steve" and "Ron" on the February seating chart. The County does not deny that employees with these names were hired for positions in the Planning and Building Department after the seating chart was created. Because agreeing to hire an employee for a particular position prior to posting indicates governmental misconduct, it is reasonable to question the County's motivation in failing to respond to this request. And, because failure to conduct an adequate search is itself a violation of the Act, questions into the County's actions are relevant.

Consequently, questions going to the County's procedures for conducting searches, including the qualifications of those conducting searches, the persons involved directly or indirectly in the search and their efforts, and the existence, location and chain of custody as to such records are all relevant, as would be questions leading to the discovery of persons

[57] *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989). *See also* RCW 42.17.290 (if a request is made at a time a record is scheduled for destruction in the near future, the agency...shall retain possession of the record and may not destroy or erase the record until the request is resolved.)

who might have information on these subjects. Finally, the Act provides for penalties where an agency did not comply with the Act. Hence, questions into motivation are also relevant.

Plaintiff's discovery was crafted to lead to evidence addressing these issues and were within the scope of the civil rules. (CP 147-188, 191-194, 424-485, 609-612.) The County's almost absolute refusal to engage in discovery is not supported by law and the trial court's refusal to compel prior to its ruling on summary judgment on behalf of the County was not supported by the facts.

V. CONCLUSION AND REQUEST FOR RELIEF

The trial court erred by shifting the burden to NASC to show the existence of responsive documents and/or their destruction where the County's affidavits were conclusory, contradicted by evidence of omitted materials and inadequate searches, and impugned by bad faith. For this reason, summary judgment was inappropriate on behalf of the County.

By contrast, summary judgment was appropriate on behalf of NASC. Despite the County's resistance to discovery, in 2008, almost two years after filing suit, NASC was able to produce enough evidence to establish no genuine issues of material fact as to whether the County conducted reasonable searches and whether the County failed to disclose

existing records responsive to Item # 2. Thus, NASC is entitled to summary judgment as a matter of law on these issues.

Issues of fact still remain, however, regarding the existence of the original seating chart and its possible destruction after May 16, 2005 and the existence of responsive records on a network drive at the time of the request. However, these issues go to penalties and are not material for a finding against the County on liability.

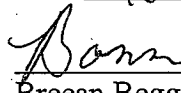
Arguably, issues of fact also exist regarding the exact search terms Ms. Knutsen used and what directories she searched in responding to Item # 2. And had NASC been given the opportunity to depose Ms. Knutsen and other County ISD technicians, it could have asked these questions. But these facts are similarly not material to the issue of liability. There is simply no evidence in the record to support a reasonable inference that Ms. Knutsen searched any computer but her new one or used any other search terms than the ones described in her only affidavit. These issues too are appropriate inquiries for the penalty phase.

Consequently, NASC asks this Court to award it summary judgment on liability and remand to the trial court for a determination of attorneys fees, costs and penalties, as provided by RCW 42.17.340(4). NASC also requests an order compelling discovery on the issue of penalties.

However, in the event this Court determines the evidence raises genuine issues of material fact regarding the existence of responsive records and the adequacy of the County's search for a finding of liability, NASC asks this Court to deny the County summary judgment and remand on the issues of liability and penalties. In that event, given the County's almost absolute refusal to engage in discovery for almost two years, NASC requests this Court to reverse the trial court and issue an order compelling discovery under CR 37(a) with sanctions prior to trial on all issues.

The Act's penalty provision, RCW 42.17.340(4), allows recovery of all costs, including reasonable attorney fees, incurred in connection with legal action to any person who prevails against an agency in a suit for the disclosure of records under the Act. Because NASC seeks an order of liability against the County as a matter of law, it herein requests recovery of such costs and fees as are allowed under the Public Records Act pursuant to RAP 18.1.

Respectfully submitted this 23rd day of October, 2008.



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Appendix A

List of cases from *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319, 332 fn. 5 (Cal. 2007) holding that the names of employees, their positions and salaries are public records:

Local 1264 v. Municipality of Anchorage, 973 P.2d 1132 (Alaska 1999) (disclosure of municipal employees' names and salaries does not violate their constitutional right of privacy or municipal code provision exempting personnel records from disclosure); *Richmond County Hospital Authority v. Southeastern Newspapers Corp.,* 252 Ga. 19, 311 S.E.2d 806 (1984) (county hospital authority required to disclose names and salaries of employees earning $28,000 or more per year); *Magic Valley Newspapers, Inc. v. Magic Valley Regional Medical Center*, 138 Idaho 143, 59 P.3d 314 (2002) (names and salaries of employees earning more than $50,000 per year not exempt from disclosure under public records law); *People ex rel. Recktenwald v. Janura,* 59 Ill.App.3d 143, 17 Ill. Dec. 129, 376 N.E.2d 22 (1978) (county forest preserve district required to disclose names and salaries of employees); *Clymer v. City of Cedar Rapids,* 601 N.W.2d 42 (Iowa 1999) (compensation of city employees, including amount of sick leave used, subject to disclosure under open records act); *State Dept. of SRS v. PERB*, 249 Kan. 163, 815 P.2d 66 (1991) (statute exempted personnel records but required disclosure of employee names, salaries, and length of employment); *Caple v. Brown,* 323 So.2d 217(La.1975) (sheriff required to disclose records of salary fund); *Moberly v. Herboldsheimer,* 276 Md. 211, 345 A.2d 855 (1975) (hospital required to disclose salary of director); *Hastings & Sons Pub. Co. v. City Treasurer,* 374 Mass. 812, 375 N.E.2d 299 (1978) (city required to disclose payroll records, including payroll records of police department); *Penokie v. Mich. Technological University,* 93 Mich. App. 650, 287 N.W.2d 304 (1980) (public university required to disclose salaries and wages of university employees); *Ms. Dept. of Wildlife v. Wildlife Enf. Off.,* 740 So.2d 925 (Miss.1999) (state agency required to disclose amount of compensation time accrued by each of its employees); *Pulitzer Pub. v. MOSERS* ,927 S.W.2d 477(Mo.App.1996) (statute requiring disclosure of public employees' salaries also required disclosure of retirees' pensions); *Mans v. Lebanon School Board,* 112 N.H. 160, 290 A.2d 866 (1972) (school board required to disclose teachers' salaries); *Winston v. Mangan*, 72 Misc.2d 280, 338 N.Y.S.2d 654 (Sup.Ct.1972) (list of park district employees and their salaries subject to disclosure); *State ex rel. Petty v.*

Wurst, 49 Ohio App.3d 59, 550 N.E.2d 214 (1989) (county required to provide names and salary rates or total compensation of its employees); *Moak v. Philadelphia Newspapers, Inc.,* 18 Pa.Cmwlth. 599, 336 A.2d 920 (Ct.1975) (city finance department required to disclose police department payroll records); *Cleveland Newspapers, Inc. v. Bradly,* 621 S.W.2d 763 (Tenn.Ct.App.1981) (hospital required to disclose payroll records); *Redding v. Brady*, 606 P.2d 1193 (Utah 1980) (state college required to disclose names and gross salaries of employees); but cf. *Redding v. Jacobsen,* 638 P.2d 503(Utah 1981) (statute prohibiting disclosure of salary information for employees of institutions of higher education is not unconstitutional); *Tacoma Public Library v. Woessne,* 90 Wn.App. 205, 951 P.2d 357 (1998) (records of employee names, salaries, benefits, and vacation and sick leave pay not exempt from disclosure). The only two cases to the contrary were *Smith v. Okanogan County, 100 Wn.App. 7, 994 P.2d 857(2000)* (list of persons employed by county prosecutor's office, including titles and rates of compensation, not within scope of public records act) and *Board of School Dir. of Milwaukee v. Wisconsin Emp. Rel. Com'n*, 42 Wis.2d 637, 168 N.W.2d 92 (1969) (names, addresses, and salaries of public school teachers are public record). The court also noted that an American Law Reports Annotation on the subject identified only two cases in which records disclosing the salaries of current government employees were held to be exempt from disclosure under state public records laws: *Priceless, supra,* 112 Cal.App.4th 1500, 5 Cal.Rptr.3d 847, and *Smith v. Okanogan County, supra, 100 Wn. App. 7, 994 P.2d 857.* (Annot., *Payroll Records of Individual Government Employees as Subject to Disclosure to Public* (1980) 100 A.L.R.3d 699, 705-706, § 3[b], and later cases (2006 Supp.) p. 80, § 3[b].)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF OF PETITIONER** by the following indicated method or methods:

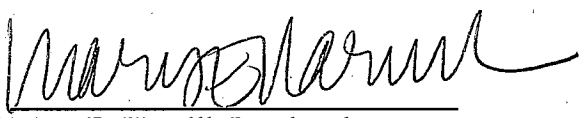
[☒] by **hand-delivering** a full, true, and correct copy with a copy of the **Report of Proceedings** thereof in sealed, first-class postage-prepaid envelopes, addressed to the person shown below, the last-known address of the person on the date set forth below.

PAT RISKEN
EVANS, CRAVEN & LACKIE
LINCOLN BUILDING #250
818 W. RIVERSIDE AVENUE
SPOKANE, WA 99201

[☒] by causing full, true, and correct copies thereof to be **hand-delivered** and filed at:

Washington State Court of Appeals
Division III
500 N. Cedar Street
Spokane, WA 99201

DATED this 23rd **day of October, 2008.**



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